

policy loan was made, under paragraph (1)(iii) of this paragraph, the tax lien is not valid against Z company with respect to the policy loan (including interest thereon in accordance with paragraph (a) of § 301.6323(e)-1).

Example 4. On June 1, 1973, a tax assessment is made against D and on June 2, 1973, in accordance with § 301.6323(f)-1, a notice of lien with respect to the assessment is filed. On July 2, 1973, D executes an assignment of his rights, as the insured, under an insurance contract to M bank as security for a loan. M bank holds its security interest subject to the lien because it is not an insurer entitled to protection under section 6323(b)(9) and did not become a holder of the security interest prior to the filing of the notice of lien for purposes of section 6323(a). It is immaterial that a notice of levy had not been served upon the insurer before the assignment to M bank was made.

(j) *Passbook loans*—(1) *In general.* Even though a notice of a lien imposed by section 6321 is filed in accordance with § 301.6323(f)-1, the lien is not valid against an institution described in section 581 or 591 to the extent of any loan made by the institution which is secured by a savings deposit, share, or other account evidenced by a passbook (as defined in subparagraph (2) of this paragraph (j)) if the institution has been continuously in possession of the passbook from the time the loan is made. This paragraph applies only to a loan made without actual notice or knowledge (as defined in paragraph (a) of § 301.6323(i)-1) of the existence of the lien. Even though an original passbook loan is made without actual notice or knowledge of the existence of the lien, this paragraph does not apply to any additional loan made after knowledge of the lien is acquired by the institution even if it continues to retain the passbook from the time the original passbook loan is made.

(2) *Definition of passbook.* For purposes of this paragraph, the term “passbook” includes—

(i) Any tangible evidence of a savings deposit, share, or other account which, when in the possession of the bank or other savings institution, will prevent a withdrawal from the account to the extent of the loan balance, and

(ii) Any procedure or system, such as an automatic data processing system, the use of which by the bank or other savings institution will prevent a with-

drawal from the account to the extent of the loan balance.

(3) *Example.*

On June 1, 1970, a tax assessment is made against A and on June 2, 1970, a notice of lien with respect to the assessment is filed in accordance with § 301.6323(f)-1. A owns a savings account at the M bank with a balance of \$1,000. On June 10, 1970, A borrows \$300 from the M bank using the savings account as security therefor. The M bank is continuously in possession of the passbook from the time the loan is made and does not have actual notice or knowledge of the lien at the time of the loan. The tax lien is not valid against M bank with respect to the passbook loan of \$300 and accrued interest and expenses entitled to priority under § 301.6323(e)-1. Upon service of a notice of levy, the M bank must pay over the savings account balance in excess of the amount of its protected interest in the account as determined on the date of levy.

[T.D. 7429, 41 FR 35501, Aug. 23, 1976]

§ 301.6323(c)-1 Protection for commercial transactions financing agreements.

(a) *In general.* Even though a notice of a lien imposed by section 6321 is filed in accordance with § 301.6323(f)-1, the lien is not valid with respect to a security interest which:

(1) Comes into existence after the tax lien filing,

(2) Is in qualified property covered by the terms of a commercial transactions financing agreement entered into before the tax lien filing, and

(3) Is protected under local law against a judgment lien arising, as of the time of the tax lien filing, out of an unsecured obligation.

See paragraphs (a) and (e) of § 301.6323(h)-1 for definitions of the terms “security interest” and “tax lien filing,” respectively. For purposes of this section, a judgment lien is a lien held by a judgment lien creditor as defined in paragraph (g) of § 301.6323(h)-1.

(b) *Commercial transactions financing agreement.* For purposes of this section, the term “commercial transactions financing agreement” means a written agreement entered into by a person in the course of his trade or business—

(1) To make loans to the taxpayer (whether or not at the option of the person agreeing to make such loans) to be secured by commercial financing security acquired by the taxpayer in the ordinary course of his trade or business, or

(2) To purchase commercial financing security, other than inventory, acquired by the taxpayer in the ordinary course of his trade or business.

Such an agreement qualifies as a commercial transactions financing agreement only with respect to loans or purchases made under the agreement before (i) the 46th day after the date of tax lien filing or, (ii) the time when the lender or purchaser has actual notice or knowledge (as defined in paragraph (a) of § 301.6323(i)-1) of the tax lien filing, if earlier. For purposes of this paragraph, a loan or purchase is considered to have been made in the course of the lender's or purchaser's trade or business if such person is in the business of financing commercial transactions (such as a bank or commercial factor) or if the agreement is incidental to the conduct of such person's trade or business. For example, if a manufacturer finances the accounts receivable of one of his customers, he is considered to engage in such financing in the course of his trade or business. The extent of the priority of the lender or purchaser over the tax lien is the amount of his disbursements made before the 46th day after the date the notice of tax lien is filed, or made before the day (before such 46th day) on which the lender or purchaser has actual notice or knowledge of the filing of the notice of the tax lien.

(c) *Commercial financing security.* (1) *In general.* The term "commercial financing security" means—

(i) Paper of a kind ordinarily arising in commercial transactions.

(ii) Accounts receivable (as defined in subparagraph (2) of this paragraph (c)).

(iii) Mortgages on real property, and

(iv) Inventory.

For purposes of this subparagraph, the term "paper of a kind ordinarily arising in commercial transactions" in general includes any written document customarily used in commercial transactions. For example, such written documents include paper giving contract

rights (as defined in subparagraph (2) of this paragraph (c)), chattel paper, documents of title to personal property, and negotiable instruments or securities. The term "commercial financing security" does not include general intangibles such as patents or copyrights. A mortgage on real estate (including a deed of trust, contract for sale, and similar instrument) may be commercial financing security if the taxpayer has an interest in the mortgage as a mortgagee or assignee. The term "commercial financing security" does not include a mortgage where the taxpayer is the mortgagor or realty owned by him. For purposes of this subparagraph, the term "inventory" includes raw materials and goods in process as well as property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

(2) *Definitions.* For purposes of §§ 301.6323(d)-1, 301.6323(h)-1 and this section—

(i) A contract right is any right to payment under a contract not yet earned by performance and not evidenced by an instrument or chattel paper, and

(ii) An account receivable is any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper.

(d) *Qualified property.* For purposes of paragraph (a) of this section, qualified property consists solely of commercial financing security acquired by the taxpayer-debtor before the 46th day after the date of tax lien filing: Commercial financing security acquired before such day may be qualified property even though it is acquired by the taxpayer after the lender received actual notice or knowledge of the filing of the tax lien. For example, although the receipt of actual notice or knowledge of the filing of the notice of the tax lien has the effect of ending the period within which protected disbursements may be made to the taxpayer, property which is acquired by the taxpayer after the lender receives actual notice or knowledge of such filing and before such 46th day, which otherwise qualifies as commercial financing security, becomes commercial financing security to

which the priority of the lender extends for loans made before he received the actual notice or knowledge. An account receivable (as defined in paragraph (c)(2)(ii) of this section) is acquired by a taxpayer at the time, and to the extent, a right to payment is earned by performance. Chattel paper, documents of title, negotiable instruments, securities, and mortgages on real estate are acquired by a taxpayer when he obtains rights in the paper or mortgage. Inventory is acquired by the taxpayer when title passes to him. A contract right (as defined in paragraph (c)(2)(i) of this section) is acquired by a taxpayer when the contract is made. Identifiable proceeds, which arise from the collection or disposition of qualified property by the taxpayer, are considered to be acquired at the time such qualified property is acquired if the secured party has a continuously perfected security interest in the proceeds under local law. The term "proceeds" includes whatever is received when collateral is sold, exchanged, or collected. For purposes of this paragraph, the term "identifiable proceeds" does not include money, checks and the like which have been commingled with other cash proceeds. Property acquired by the taxpayer after the 45th day following tax lien filing, by the expenditure of proceeds, is not qualified property.

(e) *Purchaser treated as acquiring security interest.* A person who purchases commercial financing security, other than inventory, pursuant to a commercial transactions financing agreement is treated, for purposes of this section, as having acquired a security interest in the commercial financing security. In the case of a bona fide purchase at a discount, a purchaser of commercial financing security who satisfies the requirements of this section has priority over the tax lien to the full extent of the security.

(f) *Examples.* The provisions of this section may be illustrated by the following examples:

Example 1. (i) On June 1, 1970, a tax is assessed against M, a tool manufacturer, with respect to his delinquent tax liability. On June 15, 1970, M enters into a written financing agreement with X, a bank. The agreement provides that, in consideration of such

sums as X may advance to M, X is to have a security interest in all of M's presently owned and subsequently acquired commercial paper, accounts receivable, and inventory (including inventory in the manufacturing stages and raw materials). On July 6, 1970, notice of the tax lien is filed in accordance with § 301.6323(f)-1. On August 3, 1970, without actual notice or knowledge of the tax lien filing, X advances \$10,000 to M. On August 5, 1970, M acquires additional inventory through the purchase of raw materials. On August 20, 1970, M has accounts receivable, arising from the sale of tools, amounting to \$5,000. Under local law, X's security interest arising by reason of the \$10,000 advance on August 3, 1970, has priority, with respect to the raw materials and accounts receivable, over a judgment lien against M arising July 6, 1970 (the date of tax lien filing) out of an unsecured obligation.

(ii) Because the \$10,000 advance was made before the 46th day after the tax lien filing, and the accounts receivable in the amount of \$5,000 and the raw materials were acquired by M before such 46th day, X's \$10,000 security interest in the accounts receivable and the inventory has priority over the tax lien. The priority of X's security interest also extends to the proceeds, received on or after the 46th day after the tax lien filing, from the liquidation of the accounts receivable and inventory held by M on August 20, 1970, if X has a continuously perfected security interest in identifiable proceeds under local law. However, the priority of X's security interest will not extend to other property acquired with such proceeds.

Example 2. Assume the same facts as in example 1 except that on July 15, 1970, X has actual knowledge of the tax lien filing. Because an agreement does not qualify as a commercial transactions financing agreement when a disbursement is made after tax lien filing with actual knowledge of the filing, X's security interest will not have priority over the tax lien with respect to the \$10,000 advance made on August 3, 1970.

Example 3. Assume the same facts as in example 1 except that, instead of additional inventory, on August 5, 1970, M acquires an account receivable as the result of the sale of machinery which M no longer needs in his business. Even though the account receivable was acquired by taxpayer M before the 46th day after tax lien filing, the tax lien will have priority over X's security interest arising in the account receivable pursuant to the earlier written agreement because the account receivable was not acquired by the taxpayer in the ordinary course of his trade or business.

Example 4. Pursuant to a written agreement with the N Manufacturing Company entered into on January 4, 1971, Y a commercial factor, purchases the accounts receivable arising out of N's regular sales to its

customers. On November 1, 1971, in accordance with § 301.6323(f)-1, a notice of lien is filed with respect to N's delinquent tax liability. On December 6, 1971, Y, without actual notice or knowledge of the tax lien filing, purchases all of the accounts receivable resulting from N's November 1971 sales. Y has taken appropriate steps under local law so that the December 6, 1971, purchase is protected against a judgment lien arising November 1, 1971 (the date of tax lien filing) out of an unsecured obligation. Because the purchaser of commercial financing security, other than inventory, is treated as having acquired a security interest in commercial financing security, and because Y otherwise meets the requirements of this section, the tax lien is not valid with respect to Y's December 6, 1971, purchase of N's accounts receivable.

[T.D. 7429, 41 FR 35503, Aug. 23, 1976]

§ 301.6323(c)-2 Protection for real property construction or improvement financing agreements.

(a) *In general.* Even though a notice of a lien imposed by section 6321 is filed in accordance with § 301.6323(f)-1, the lien is not valid with respect to a security interest which:

(1) Comes into existence after the tax lien filing,

(2) Is in qualified property covered by the terms of a real property construction or improvement financing agreement entered into before the tax lien filing, and

(3) Is protected under local law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation.

For purposes of this section, it is immaterial that the holder of the security interest had actual notice or knowledge of the lien at the time disbursements are made pursuant to such an agreement. See paragraphs (a) and (e) of § 301.6323(h)-1 for general definitions of the terms "security interest" and "tax lien filing." For purposes of this section, a judgment lien is a lien held by a judgment lien creditor as defined in paragraph (g) of § 301.6323(h)-1.

(b) *Real property construction or improvement financing agreement.* For purposes of this section, the term "real property construction or improvement financing agreement" means any written agreement to make cash disbursements (whether or not at the option of

the party agreeing to make such disbursements):

(1) To finance the construction, improvement, or demolition of real property if the agreement provides for a security interest in the real property with respect to which the construction, improvement, or demolition has been or is to be made;

(2) To finance a contract to construct or improve, or demolish real property if the agreement provides for a security interest in the proceeds of the contract; or

(3) To finance the raising or harvesting of a farm crop or the raising of livestock or other animals if the agreement provides for a security interest in any property subject to the lien imposed by section 6321 at the time of tax lien filing, in the crop raised or harvested, or in the livestock or other animals raised.

For purposes of subparagraphs (1) and (2) of this paragraph (b), construction or improvement may include demolition. For purposes of any agreement described in subparagraph (3) of this paragraph (b), the furnishing of goods and services is treated as the disbursement of cash.

(c) *Qualified property.* For purposes of this section, the term "qualified property" includes only—

(1) In the case of an agreement described in paragraph (b)(1) of this section, the real property with respect to which the construction or improvement has been or is to be made;

(2) In the case of an agreement described in paragraph (b)(2) of this section, the proceeds of the contract to construct or improve real property; or

(3) In the case of an agreement described in paragraph (b)(3) of this section, property subject to the lien imposed by section 6321 at the time of tax lien filing, the farm crop raised or harvested, or the livestock or other animals raised.

(d) *Examples.* The provisions of this paragraph may be illustrated by the following examples:

Example 1. A, in order to finance the construction of a dwelling on a lot owned by him, mortgages the property to B. The mortgage, executed January 4, 1971, includes an agreement that B will make cash disbursements to A as the construction progresses.